The curriculum remains practically the same as last year, although the reduced number of both students and faculty will result in the omission of a few of the usual courses. But the labors of the professors will be heavier rather than lighter than in normal years. Certain members of the faculty are taking part in the instruction of the student-soldiers of the University, giving courses on "Military Law" and "Issues of the War" which form part of the curriculum prescribed by the War Department. In addition, the absence of student editors will compel the JOURNAL to look to the faculty for more assistance than usual in the publication of editorial comments on recent cases.

ARMY DISCIPLINE AND THE LAW OF THE LAND

The double necessity of preserving that boasted bulwark of Anglo-Saxon institutions, "the supremacy of law,"[1] and at the same time maintaining discipline in the military and naval forces of the nation gives rise to interesting and troublesome problems. The soldier or sailor is bound to obey his superior officer; he is also subject to the law of the land.[2] Consequently when ordered to do an act which may prove to be unlawful he finds himself, in homely phrase, "between the devil and the deep sea." If he refuses to act he will be called upon to justify his disobedience before a court-martial, and the court-martial may decide that the order was not unlawful; if he carries out the order he may be haled before a civil court to answer a criminal charge or to defend a suit for damages, and that tribunal may find that the act was unlawful.

Faced by this awkward dilemma, soldiers will find comfort in a recent decision of the Supreme Court of Rhode Island, *State v. Burton* (1918, R. I.) 103 Atl. 962. This was a criminal complaint charging a member of the U. S. Naval Reserve Force, assigned to duty as a dispatch carrier at Newport, with violating the state automobile speed law. His defense was that he had acted under a specific order of his superior officer, which order was assumed by the officer to necessitate a violation of the state speed law and was given in a matter appertaining to the war and deemed by the officer to be urgent.

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[1] This phrase denotes, among other things, that "every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals": see Dicey, *The Law of the Constitution* (6th ed.) 189.

"The established principle of every free people is, that the law shall always govern; and to it the military must always yield": Mr. Justice Field, in *Dow v. Johnson* (1879) 100 U. S. 158, 169. See also Menzies, *The Rule of Law during the War.*

[2] Dicey, *op. cit.* 295 ff.; see *State v. Sparks* (1864) 27 Tex. 627, 632: "The soldier is still a citizen, and as such is always amenable to the civil authority."

The court held that the defendant was not guilty of violating the state law.[3]

The doctrine of the supremacy of the law does not mean that the ordinary rules which determine lawful conduct may never be subordinated to military necessities. The common law has long recognized that private property may be seized or destroyed in the necessary defense of the realm without liability, civil or criminal, attaching to the military forces whose acts have overridden private rights.[4] No doubt a similar privilege exists to interfere with personal liberty if military necessity demands it.[5] These are but applications of the general principle of "necessity," which requires private right to yield to public need—a principle which does not pertain to the soldier as such, but applies equally to the fire-marshal who destroys a building to prevent conflagration,[6] to the ship's captain who jettisons cargo to save his vessel,[7] or to the sheriff who seizes and restrains a dangerous lunatic.[8] The same privileges are possessed by a private individual if the public danger makes it his duty to act.[9] But the danger which justifies such trespasses upon private rights must be "immediate and impending; or the necessity urgent for the public service, such as will not admit of delay. . . . It is the emergency that gives the right [privilege], and the emergency must be shown to exist before the taking can be justified."[10]

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[3] For a more complete statement of the precise question decided by the court, see RECENT CASE NOTES, *infra*.

The question whether a civil court has jurisdiction in time of war to try a soldier for crime was not discussed. On this subject see *Ex parte King* (1917, E. D. Ky.) 246 Fed. 868; (1918) 27 YALE LAW JOURNAL 837.

[4] *The King's Prerogative in Saltpetre* (1606) 12 Rep. 12 (6 Coke's Rep. 206): "When enemies come against the realm to the sea-coast, it is lawful to come upon my land adjoining to the same coast, to make trenches or bulwarks for the defence of the realm, for every subject hath benefit by it. And therefore by the common law, every man may come upon my land for the defence of the realm, as appears 8 Ed. IV, 23."

[5] See Dicey, *op. cit.* 505; see H. Erle Richards, *Martial Law* (1902) 18 L. QUART. REV. 133, 137; see also cases cited in L. R. A. 1915 A, 1149; and *Moyer v. Peabody* (1909) 212 U. S. 78, 29 Sup. Ct. 235.

[6] *Mayor etc. of New York v. Lord* (1837, N. Y. Sup. Ct.) 17 Wend. 285, 290.

[7] *Mouse's Case* (1608, K. B.) 12 Rep. 63 (6 Coke's Rep. 279).

[8] See *Keleher v. Putnam* (1880) 60 N. H. 30.

[9] See Dicey. *op. cit.* 506; also Sir F. Pollock, *What is Martial Law* (1902) 18 L. QUART. REV. 152, 153; and the *Saltpetre Case, supra*.

[10] This is the language of Taney, C. J., in the leading case of *Mitchell v. Harmony* (1851, U. S.) 13 How. 115, 134, which held that Lt. Col. Mitchell was liable in trespass for seizing private property which he believed to be in danger of falling into the hands of enemy Mexican forces. The Chief Justice goes on to explain that, in deciding the question of necessity, the state of facts as they reasonably appeared to the officer at the time he acted must determine his justification. His honest belief in the emergency is not enough; he must show that he had reasonable grounds for such belief. Compare Dicey, *op. cit.* 513-519.

It seems difficult to believe that a military necessity of this description could in fact have existed to carry a dispatch through the streets of Newport at a rate of speed endangering the lives of pedestrians. At least no such necessity was shown to exist. Moreover the decision, so far as it rests on the doctrine of military necessity, would involve the extension of the area of necessity to include a place far removed from the actual theatre of war.[11] But the language of the opinion is much broader than the established doctrine of necessity as above defined. The court asserts that "any state law, the operation of which will hinder that government [the federal] in carrying out such constitutional power [the war-power] is, during the exercise of the power, suspended as regards the national government and its officers who are charged with the duty of prosecuting the war"; and further, that "any plan of the naval authorities for the furtherance of that purpose [guarding our coast] cannot be hampered by the enforcement of the ordinary regulations pertaining to the use of our highways." This, it is respectfully submitted, goes much beyond the principle of a reasonable military necessity.[12] It would seem to permit a military officer to override any law which he believes a hindrance to his military activities. The fact that a federal officer or agent is acting in a matter over which the federal government has exclusive jurisdiction does not give him complete discretion to override the local law.[13] He is privileged to disregard the ordinary rules of conduct prescribed by the state law only when it becomes his federal

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[11] A very interesting English case intimates that modern methods of warfare have extended the area of military necessity far beyond the immediate field of battle. So that on the strength of the doctrine of the *Saltpetre Case* the court held lawful the seizure by military authorities, without compensation, of inland property desired for an aerodrome. *In re a Petition of Right* (C. A.) [1915] 3 K. B. 649; (1918) L. QUART. REV. 152. See also Sir F. Pollock, *What is Martial Law* (1902) 18 L. QUART. REV. 152, 157: "There may be a state of war at any place where aid and comfort can be effectually given to the enemy, having regard to the modern conditions of warfare and means of communication."

[12] See Taney, C. J., in *Mitchell v. Harmony, supra,* 135: "Our duty is to determine under what circumstances private property may be taken from the owner by a military officer in time of war. And the question here is, whether the law permits it to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it."

[13] A mail carrier is not, because of his work in handling United States mail, privileged to disregard the reasonable traffic regulations established by the city over whose streets he drives a mail wagon. *Commonwealth v. Closson* (1918, Mass.) 118 N. E. 653, L. R. A. 1918 C, 939.

See also *Ex parte Marshall* (1918, Fla.) 77 So. 869, holding that a motor-omnibus owner, who was given by the commanding officer of Camp Johnston the exclusive privilege of running a bus line between the camp and the city of Jacksonville to transport officers and enlisted men, was not exempt from payment of the state license tax levied upon motor-carriers.

duty to do so, and it is his federal duty to so act (in the case of a naval or military officer whose duty is not prescribed by a specific federal statute), only in the event of necessity arising from facts which the officer may reasonably believe to create an immediate and impending public danger.[14]

But while one may respectfully disagree with the court's reasoning in so far as it implies that the naval officer was justified in disregarding the speed law, the decision exempting the dispatch carrier from liability is believed to be sound. The law may well draw a distinction on grounds of policy between the officer who initiates the act which overrides the ordinary rule of lawful conduct and the private who performs the act in obedience to orders.[15] The initiator must justify the act on the principle of reasonable military necessity; the private, it is submitted, may justify it on the principle of his duty to obey every military order which does not clearly appear to be illegal.[16] Circumstances might conceivably exist which, under the principle of necessity, would justify disregarding the speed law in order to deliver a military dispatch in Newport (e. g., if a hostile submarine were about to attack the coast and measures for defense required the immediate delivery by automobile of a dispatch relating thereto). If, therefore, the order may be legal under certain circumstances and if the nonexistence of such circumstances is not clearly apparent to the soldier, his duty is to obey, not to debate with his superior officer whether in fact the necessity exists which justifies it. No other rule could maintain discipline. Therefore, if the execution of the order infringes private rights let the injured party seek redress from the officer who initiated it, not from the private whose duty it was to obey. And even more obvious are the reasons for exempting the private from criminal responsibility for acts done in obedience to orders not clearly illegal.

It is true that not all the decisions harmonize with this theory.[17] Numerous cases assert that an illegal order cannot furnish justification to one who acts upon it.[18] Such a principle, it is submitted, is

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[14] It must be admitted that *dicta* may be found which imply that under our Constitution the civil law to which the soldier remains subject is that of the nation, not that of the states, and hence that state statutes cannot apply to members of the military or naval forces. See *Ex parte Bright* (1874) 1 Utah, 145, 152; *In re Fair* (1900, C. C. Neb.) 100 Fed. 149, 156. The latter case was cited by the Rhode Island court in the principal case. Limits of space forbid a discussion of this theory. It is believed to be incorrect.

[15] 1 Stephen, *Hist. Crim. Law,* 205; cases cited in L. R. A. 1915 A, 1141 ff.

[16] Under some circumstances it is the duty of the soldier to disobey his officer. See Stephen, *Digest Crim. Law,* 163; *United States v. Greiner* (1861, D. C. Pa.) 4 Phila. 396 (order to commit act of treason); see also discussion in *United States v. Clark* (1887, C. C. Mich.) 31 Fed. 710.

[17] See cases cited in L. R. A. 1915 A, 1141 ff.

[18] See *Bates v. Clark* (1877) 95 U. S. 204, and cases cited in 2 Winthrop, *Mil. Law,* 135. Some of the cases may be harmonized on the principle, sug-

unreasonably harsh toward the soldier. It is believed that the better reasoned authorities accord with the theory above advanced. The Rhode Island court relied in part upon this principle. So far as the opinion sanctions the view that state statutes or the rules of the common law may be overridden in the discretion of the military, it is believed to go too far. Everyone will sympathize with the attitude which strives in every way to facilitate the military and naval authorities in the successful prosecution of the war, and yet even in these times the courts must guard jealously our Anglo-Saxon heritage of "the supremacy of law."

THE NEGATIVE CONTRACT IN OPTIONS

An option is of value as a grappling-iron to enable the option holder to close at will with the option giver; it is no less of value as a buffer to keep other would-be contractors away from the option giver in the meanwhile. This last is worth remembering; sometimes a case serves to point the moral that it is.

For a valid consideration Mrs. Saraceno made an agreement with Carrano regarding certain of her real estate, "meaning . . . . to give to the said A. R. Carrano the option upon the purchase" of the property for $11,200, if Mrs. Saraceno "at any time should desire to sell said property." Nine years later Mrs. Saraceno brought suit to have the agreement cancelled and her property freed from any cloud created by it. The court held that the agreement was a "double option" under which the plaintiff might elect to sell or not to sell, and that after the lapse of nine years it was to be presumed that she had elected not to sell. Consequently, the court ordered that the agreement be cancelled and the plaintiff's property discharged from all encumbrance by reason of it. *Saraceno v. Carrano* (1918) 92 Conn. 563, 103 Atl. 631.

The general idea of *option* appears to contain several essential elements: (1) a power in the option holder, (2) to impose, wholly at his own choice, a duty upon the option giver, (3) which power is derived through a previous legal transaction between the two, is (4) of a certain permanence in point of time, irrevocable throughout its duration, which is fixed in advance, and (5) is accompanied by a duty in the option giver not to wipe out the power by conveyance to a *bona fide* purchaser for value, and (6) by a disability in the option giver to convey free of the option holder's power to any person not a *bona fide* purchaser. The ordinary offer of a contract is not an option because it lacks these last three elements.[1] The transaction in the principal case

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gested in Wyman, *Administrative Law*, secs. 2-3, that where a discretion is vested by law in the officer, his order will protect his subordinate, but where the officer's duty is ministerial merely, his order will not protect.

[1] *Dickinson v. Dodds* (1874, C. A.) 2 Ch. D. 463.